

(2013) 06 KAR CK 0187

In the Karnataka High Court

Case No : STRP No. 112 of 2008 connected with STA No"s. 11 and 12 of 2008 and Writ Appeal No. 1260 of 2006 (T-KST)

Mysore Polymers and Rubber Products Ltd.

APPELLANT

Vs

Commissioner of Commercial Taxes
 Kaytee Switch
Gear Ltd. Vs State of Karnataka
 Deputy Commissioner
of Commercial Taxes, (Assessment-11, Fast Track), Bangalore
and Others Vs Hindustan Petroleum Corporation Limited

RESPONDENT

Date of Decision : 17-06-2013

Acts Referred:

Citation : (2013) 66 VST 129

Hon'ble Judges : D.V. Shylendra Kumar, J;B.S. Indrakala, J

Bench : Division Bench

Advocate : T.N. Keshavamurthy, Surendran Thumbhoochetty, G. Rabinathan and M. Thirumalesh for the dealer, for the Appellant; S. Sujatha, Additional Government Advocate, for the Respondent

Judgement

D.V. Shylendra Kumar, J.—This appeal u/s 4 of the Karnataka High Court Act is by the State of Karnataka by its Finance Secretary and Office of the Deputy Commissioner of Commercial Taxes Department of the State Government and is directed against the order dated June 9, 2006 (Hindustan Petroleum Corporation Limited Vs. The Deputy Commissioner of Commercial Taxes (Assessments-11, Fast Track), The Deputy Commissioner of Commercial Taxes (Intelligence-3) and The State of Karnataka,) passed in W.P. No. 34986 of 2004 by the learned single judge of this court allowing the writ petition of the respondent. The effect of the order being to relieve the respondent of its tax liability u/s 6B of the Karnataka Sales Tax Act 1957 (for short, "the Act") and at the relevant point of time as to what was known as resale tax and the State losing considerable revenue is in appeal contending that the order passed by the learned single judge is not proper, not on a proper understanding of the provisions of section 6B; that it is not sustainable and is liable to set aside and on such grounds. The brief facts leading to the above appeal are as under:

The respondent/writ petitioner, M/s. Hindustan Petroleum Corporation Limited, is an oil company dealing in oil and petroleum products. It is a registered dealer under the provisions of the Karnataka Sales Tax Act, 1957. The writ petitioner/company buys the petroleum products from other oil companies and has stock transfers from its other branches and from out of the State. It is having its regional office at K.R. Puram, Bangalore. The period with which we are concerned is the assessment years 2002-03 and 2003-04 and the liability or otherwise of the turnover of the assessee which is to be taxed u/s 6B of the Act.

2. The returns filed by the assessee in respect of its turnover for the assessment year 2002-03 which had been initially accepted and in the return the assessee had claimed nil tax liability u/s 6B but had offered the other part of its turnover for tax under the other provisions of the Act. However, the assessment was reopened u/s 12A of the Act by issue of notice and the assessing officer heard representative of the assessee and concluded the reassessment order on July 29, 2004, holding that the assessee is liable to pay resale tax u/s 6B and accordingly, brought to tax that part of the turnover of the assessee which was liable to tax u/s 6B and in view of the non-disclosure in the earlier returns about the liability u/s 6B levied penalty also.

3. For the assessment year the returns filed for 2003-04 was yet to be processed. In the interregnum there was an inspection of the premises of the assessee by the intelligence officer on June 24, 2004 and the inspecting officer on noticing certain discrepancies, particularly the non-offer of the turnover for taxability u/s 6B of the Act and other discrepancies, passed a provisional order covering the turnover, taxable u/s 6B and as a result, passed an order on August 5, 2004 u/s 28(6) of the Act. It appears in the normal course, the return also was processed and the assessment order came to be passed but we are not concerned with that here. At the same time, it should be noticed that the assessee was held liable to pay tax u/s 6B of the Act and as earlier provisional assessment order in respect of this had already been done, no demand was raised but of course in the interregnum as the assessee had approached this court by filing a writ petition and the same was seized before this court, no demand was raised or issued on this part of the turnover relating to the turnover taxable u/s 6B. The liability as determined u/s 28 is the same as the liability determined under regular assessment order.

4. The respondent/dealer questioned the legality of these two orders by filing W.P. 34986 of 2004 (Hindustan Petroleum Corporation Limited Vs. The Deputy Commissioner of Commercial Taxes (Assessments-11, Fast Track), The Deputy Commissioner of Commercial Taxes (Intelligence-3) and The State of Karnataka,) before this court contending that there was no liability on the petitioner for levy of tax u/s 6B of the Act for the reason that levy of tax under this provision is only on resale; that there was no resale in the hands of the petitioner/dealer; that the petitioner effected sale in favour of other oil companies; that the entire sale of the writ petitioner/corporation was in favour of

other oil companies; in respect of turnover nil tax liability was claimed u/s 6B of the Act; that in the light of the provisions of section 6B of the Act saying that this is a resale tax and having the heading or caption as resale tax and also in the light of the second proviso to section 5(3)(a) to the Act that sale by an oil company to other oil companies being deemed to be not a sale in respect of transaction by the first or the earliest successive dealers in the State but the subsequent sale by the oil company to a non-oil company be deemed to be the first sale, shall be deemed to be the first sale by the first or the earliest of such dealers in the State, liable to tax u/s 5(3)(a) of the Act and because of such a deeming provision, the sale from one oil company to another oil company not in the nature of a sale, for the purpose of section 5(3)(a), the transaction which is taken to be a non-sale cannot be subjected to tax u/s 6B of the Act also.

5. One other argument that is sought to be raised on behalf of the petitioner/dealer was in view of the tenth proviso to section 6B of the Act and also in the writ petitioner's case tenth proviso to section 6B getting attracted the turnover was not liable to tax u/s 6B in terms of tenth proviso to this section.

6. It was also contended that in view of Explanation II for the purpose of the second proviso to clause (a) to sub-section (3) of section 5 elaborating the expression "oil company; that the purchases made by the petitioner/company from MRPL or in other sale by MRPL in favour of writ petitioner oil company is deemed not a sale and likewise, the sale by the petitioner/oil company to another oil company is also being deemed as not a sale in favour of a non-oil company in such circumstances when there was no sale at all, there was no scope for levy of resale tax on the turnover and therefore, there was no liability u/s 6B on the petitioner/company and the reassessment order was wrong and be quashed.

7. Before the learned single judge, the writ petition was resisted by the State by filing statement of objections. It was sought to be contended that the caption given to the section cannot be a decisive factor, the liability in a taxing provision cannot be inferred by merely looking at the heading of the section but what is material is the contents of the charging section. Where the charging section creates a liability in a transaction and it is clear and unambiguous, the liability so created cannot be relieved by the heading of the section.

8. The writ petitioner would be liable to tax u/s 5(3)(a) being the earliest of the dealers effecting sales of the product in the State but for the provisions of the second proviso to section 5(3)(a). Read with Explanation 2 to section 5(3)(a) and the fiction is not even considered to be the first sale of the sale by the earliest of the dealers and the second proviso to section 5(3)(a) takes care of the liability in its provision and as such there being no liability u/s 5(3)(a) and the petitioner fulfilling the requirements of section 6B, tax u/s 6B is attracted.

9. Though section 6B was by way of substitution of the earlier provision of what is known as turnover tax being levied, the only significant change that has been

brought about in section 6B resale tax is to enable a dealer to pass on the liability u/s 6B whereas earlier the turnover tax u/s 6B as it stood earlier was to be borne by the dealer and was not permitted to be passed on to the purchaser. The other contentions urged on behalf of the assessee were all unfounded and therefore he has prayed for dismissal of the writ petition.

10. The arguments relating to the effect that the Explanation to section 5(3)(a) of the Act has over the matter in question found favour with the learned single judge.

11. However, learned single judge did not elaborate on this aspect of the matter but nevertheless thought it proper to accept the contention of the assessee on the question of the liability u/s 6B to be only in respect of a resale and noticing that it was not a resale as contended by the assessee and for the reason that there was exemption u/s 5(3)(a) of the Act and more so for the reason that the scheme of the section is not to levy tax on the first sale, that is only on "resale", the meaning of the word "resale" has to be gathered from not only the caption but also from the budget speech of the Finance Minister made on the floor of the assembly while introducing Bill proposing the substitution of section 6B which was known earlier as "turnover tax", but what is known as resale tax with effect from April 1, 2002 and impressed by the argument addressed in this regard particularly meaning of the word "resale" as defined in the dictionary and the background of the budget speech and such other aspects held in favour of the assessee and placing strong reliance on the decision of this court in the case of Madhur Trading Co. and others Vs. State of Karnataka and others, opined that the reassessment orders dated July 29, 2004 and particularly the assessment order dated August 5, 2004 in respect of years 2002-03 and 2003-04, respectively, are not sustainable and liable to be quashed as the petitioner was not liable to pay initial tax u/s 6B of the Act and allowed the writ petition. It is against this order of the learned single judge, the writ appeal is filed.

12. Before recording the submissions made at the Bar in this appeal, it is to be noticed that STRP No. 112 of 2008 and STA Nos. 11 and 12 of 2008 are also connected with this appeal and all these matters are heard together.

13. In STRP No. 112 of 2008, the sales tax revision petition u/s 23(1) of the Act is by the assessee/dealer being aggrieved by the order passed by the Tribunal dated May 6, 2008 passed in STA No. 299 of 2006 dismissing the appeal of the assessee which was in turn directed against the first appellate authority which also dismissed the appeal of the assessee against the order of the three assessing authorities. The contention of the assessee that it was not liable to pay tax u/s 6B in lieu for proviso to section 5(3)(a) of the Act.

14. The assessing authority had rejected such contention of the assessee that it was not liable to pay tax u/s 6B in view of the fiction created by the third proviso to section 5(3)(a) and this had been successively affirmed by the first appellate authority and the Karnataka Appellate Tribunal and therefore, this revision

petition by the assessee/dealer.

15. The arguments are common and the period of assessment is 2002-03 and 2003-04, i.e., first two years after introduction of resale tax u/s 6B of the Act.

16. The assessee/dealer in this case is a manufacturing dealer who had occasion to supply rubber tubes to Ceat Company which was brand holder of the Ceat and the product being marketed under this brand name, i.e., the assessee/dealer is a supplier of part of a product in respect of which M/s. Ceat Tyres holds the manufacturing brand and the product is marketed under their brand name. A fiction having been created under the third proviso to section 6B in respect of a sale by manufacturers/suppliers of a brand holder as in the case of the second proviso in respect of the oil companies and therefore, except for the difference that the deeming provision of the fiction being under different provisions for the assessee in the writ petition and this assessee, all other arguments are one at the same.

17. STA Nos. 11 and 12 of 2008 are also appeals and they are linked along since they too raise the question of the taxability of the assessee/dealer u/s 6B of the Sales Tax Act. In this case the assessee is a manufacturer and seller of electrical motors which is supplied to Kirloskar Electric Company--the brand holder's name is affixed and sold by the assessee/dealer and therefore is also a dealer who is covered under the 3rd proviso to section 5(3)(a) as in the case of assessee in STRP No. 112 of 2008. Except for this difference on facts insofar as the legal position is concerned, the contentions are the same or almost identical in the case of the assessee in the writ petition and the revision petitioner and the appellant.

18. In the instant case, the assessment orders are of 2003-04 and 2004-05, respectively and the appeals by the assessee/dealers are directed against the revisional orders passed by the Additional Commissioner of Commercial Taxes revising the orders passed by the first appellate authority who had allowed the appeal of the assessee/dealer to hold that assessee/dealer was not liable to pay resale tax u/s 6B of the Act.

19. This view was held to be erroneous and prejudicial to the Revenue. Therefore the order was revised by the Additional Commissioner after issue of notice and the order passed by the assessing authority holding that the assessee was liable to pay tax u/s 6B for the relevant assessment year was restored. It is in this background the assessee/dealer being aggrieved has preferred these two appeals.

20. We have heard Smt. Sujatha, learned Additional Government Advocate appearing for the appellant/State in W.A. No. 1260 of 2006 and the respondent/authorities in the sales tax revision petition and in the sales tax appeals.

21. In the writ appeal the respondent/assessee-dealer is represented by Sri Rabinathan and Thirumalesh. The revision petitioner in STRP by the assessee is

represented and argued by Sri Keshavamurthy--learned counsel and the sale tax appeal of the assessee, i.e., STA Nos. 11 of 2008 and 12 of 2008 are being argued by Sri Surendran Thumbhoochetty.

22. We have heard learned counsel for the State and learned counsel for the assessee at length.

23. Appearing on behalf of the appellant/State, Smt Sujatha--learned Government Advocate has by pointing out the provisions of section 6B of the Act and the provisions of the provisos to section 5(3)(a) of the Act has vehemently urged that the scope and ambit of section 5(3)(a) has totally been misconstrued and has not been properly understood; that there was incorrect application of the ruling rendered by this court in the case of Madhur Trading Co. and others Vs. State of Karnataka and others, ; that the learned single judge did not notice the future of the kind of exemption or non-tax liability as in the case of Madhur Trading Co. and others Vs. State of Karnataka and others, which was the case interpreting the proviso to section 5(3)(c) of the Act and the language employed therein. Proviso makes it clear about the scope and the applicability of the fiction for the purpose of the entire Act and that sale by handloom or powerloom weaver is not covered by a definition of "factor" under the Factories Act who produce fabric in the State of Karnataka was by a fiction, not deemed as a sale by the proviso for the purpose of the entire Act and the fiction operated throughout the Act insofar as such a dealer was concerned but it is pointed out that in the present case, the second and third proviso to section 5(3)(a) is only for the purpose of this section 5(3)(a) and such a fiction cannot be extended to other provisions and cannot be telescoped into provisions of section 6B nor for understanding or interpreting section 6B of the Act. A very obvious distinction has been lost sight of by the learned single judge and learned single judge being of the view that the present case on facts and law is on par with the facts and law as prevailed in Madhur Trading Co. and others Vs. State of Karnataka and others, , by placing strong reliance on this case, has proceeded to allow the writ petition by applying the ratio enunciated in the said case. It is submitted that it is this fallacious assumption that has affected the correctness of the order.

24. On the question of understanding such a provision and interpretation of the same, the submission of the learned Government Advocate is that the decision of this court rendered in the case of Universal Transformers Vs. Assistant Commissioner of Commercial Taxes and Others, is nearer home that it was clearly held in this case that the liability u/s 6B when it was turnover tax but analogous and the charge u/s 6B being on par with the charge as of now though it is named as resale tax and the case being one of supplier of goods to a brand holder or a manufacturer and it was held in this case that though u/s 5(3)(a) there may not be a liability in respect of that part of the turnover of the dealer, it does not get itself carried to liability u/s 6B of the Act and the fiction created though it is held as exemption is not extended to the turnover tax liable u/s 6B and likewise, the operation of the provisions u/s 5(3)(a) cannot be either claimed

for the benefit or cannot be extended or telescoped into the provisions of section 6B is the argument.

25. Elaborate arguments are addressed by the learned Government Advocate with regard to the meaning and understanding of resale tax and in the background of the budget speech also. Submission is that on a careful reading of the budget speech, particularly paragraphs 170, 171 and 177 which is also relied upon by the learned counsel for the assessee, it is not necessarily indicated that the levy of resale tax is only in respect of a second or subsequent transaction and the mere fact that it was mentioned as one preceding the VAT, makes liable an assessee for a multiple point levy under VAT Act whereas the levy under the Act is only a single point levy under the Karnataka Sales Tax Act showing that the assessee is entitled to pass on the tax to the purchaser does not in any way either indicate or can be concluded that it was only a tax on second or subsequent sale; that it was never spoken of in the budget speech that it is not a tax in respect of the first sale or turnover relating to the sale transaction which are in the nature of a first sale transaction in the State by a dealer. There was also a reference to the entry tax in paragraphs 170 and 171 and what was mentioned was abolition of multiple levies and simplification of measures. It is submitted that the expression that the proposal to introduce and collect resale tax at 1.5 per cent was to distinguish it from the earlier turnover tax and except for this nothing more was elaborated in the budget speech on the scope of resale tax, etc. But what is vehemently argued is that the heading under the budget speech assuming the mention of a resale tax; that in itself is not a decisive or concluding factor; that in a taxing statute, the liability is created only by the charging section and the language and the meaning of the charging section is what is to be looked into and if there is any scope or interpretation in view of the lack of proper expression or ambiguity in the charging section, then alone there can be scope or resort to interpretation by taking aids either from budget speech or from marginal notes or headings and in the present case, it is urged that there is absolutely no ambiguity or scope for misunderstanding in the language of section 6B of the Act which characterizes resale tax.

26. In respect of the effect of a budget speech and the manner in which it can collect or effect the charging section and also the legal position in regard to budget speech, it is submitted that whatever might have been the budget speech, unless it is translated into the statutory provision and made part of the statutory provision, the budget speech remains as a speech and does not in any way have a bearing on the operation of the provisions of the Act. Reliance is placed on a decision of the Division Bench of this court rendered in the case of *Amberkar Pre Stressed Products and Others Vs. Additional Commissioner of Commercial Taxes*, rendered on August 6, 2009 in TAET Nos. 1 of 2006, 2 of 2006 and 3 of 2006 and contended relying on the latter part of this judgment which reads as under (page 446 in 32 VST):

While the facts it appears to be not correct as the relevant period which was

subject-matter of assessment by the assessing officer was from April 1, 2002 to March 31, 2003. Even in law, if by subsequent notification an entry in the table indicating the rate at which the particular item should be taxed is omitted the effect is that there is tax liability till that date and it does not become operative from an earlier date just because the Finance Minister had made a budget speech proposing certain benefits. Whatever speech might have been made by the Finance Minister, ultimately, what matters is what part of the speech is translated into statutory provision and in what manner.

27. It is submitted that it is only a caption and need not give the real purpose of the object of the levy and at any rate cannot be a guiding factor for collecting the tax. In support of such submission, reliance is placed on the decision of the Supreme Court in the case of *Municipal Council, Kota, Rajasthan Vs. The Delhi Cloth and General Mills Co. Ltd., Etc. Etc.,* .

28. Placing reliance on the case of the judgment of the Supreme Court in *Municipal Council, Kota, Rajasthan Vs. The Delhi Cloth and General Mills Co. Ltd., Etc. Etc.,* , the submission of learned Government Advocate is that it was clearly held in this case that nomenclature of the levy is not very material but the substance of charging section is what matters. In this case the Supreme Court had occasion to refer to the judgment of the Judicial Committee in the case of AIR 1930 129 (Privy Council) and as it was noticed in this case that the subject-matter of tax is not "water" though it is called water tax, in that it is not levied on its production and following this it was held that the nomenclature used or chosen to christen the levy is not really relevant or determinative of the real character or the nature of levy, for the purpose of adjudging a challenge to the competency or power to legislate or impose a levy. What really has to be taken is the pith and substance or the real nature or the character of levy which has to be adjudged, with reference to charge, viz., the taxable event and the incidence of levy. The levy known as dharmada was held to be in the case of *Municipal Council, Kota, Rajasthan Vs. The Delhi Cloth and General Mills Co. Ltd., Etc. Etc.,* was in the nature of octroi and it was upheld reversing the decision of the High Court wherein the assessee's view had been favoured.

29. Based on the ratio of this judgment of the Supreme Court, it is submitted that the substance in the taxing statute is an ingredient of the charging section and not merely the heading is what is held in this case and this ratio is called to bolster the argument that the heading resale tax is not decisive of the nature of levy u/s 6B of the Act.

30. One another decision relied upon by the learned Government Advocate to submit that the fiction created for a limited purpose cannot be extended to other provisions and for such purpose the case of *Municipal Council, Kota, Rajasthan Vs. The Delhi Cloth and General Mills Co. Ltd., Etc. Etc.,* , the judgment of the Division Bench of this court is relied upon wherein it has been held that the fiction created in proviso to section 5(4) of the Act cannot be extended to section 6 of the Act for levy of purchase tax and this argument and this ratio is called in

aid to submit that the scope of second and third proviso to section 5(3)(a) cannot be extended to the understanding or interpreting the provisions of section 6B of the Act.

31. Summing up the submissions, the learned Government Advocate submits that by pointing out to the statutory provisions and based on such judgment of this court and the Supreme Court that at the first instance, a heading resale tax in itself is not conclusive; that on a reading of section 6B, the levy is not in any way indicated to be in respect of a transaction which is second or the subsequent transaction and not on the first transaction as the language of the section indicates that every registered dealer and every dealer who is liable to get himself registered under the Act and subject to the exceptions therein is liable to tax, the only mitigating factor being that the turnover in respect of the taxes u/s 6B is attracted and levied, should not have been taxed or liable to tax u/s 5, 5A, 5B, 5C or 6. It is submitted in this regard that the argument of the assessee that it is exempted but it is still liable to tax, is not an argument that can be accepted as the benefit of no tax liability in the case of the assessee or dealers covered by the second and third proviso to section 5(3)(a) is given to the assessee or dealers under the very taxing provision of the charging section 5 and not by any exemption notification notified elsewhere and therefore, it has to be held that there is no tax liability on such dealers u/s 5 and at any rate no tax is paid or collected from such dealers u/s 5 nor does it become possible so long as the provisions of the second and third proviso to section 5(3) is attracted to a dealer.

32. It is also submitted that the assessee and dealers in the present case are not governed by the provisos 1 to 11 and particularly 10th proviso to section 6B to take them out of the purview of levy of tax u/s 6B for the simple reason that none of the assessee is liable to pay tax when their goods are sold whether in favour of another oil company in case of the writ petitioner and to a brand holder as in the case of review petitioner and the appellant in STRP and the STA.

33. It is also submitted that the taxability of a particular product under the taxing enactment is dependent on the scope of the charging section, the subject-matter of charge and the happening of an event which attracts the liability for payment of taxes and the nature of transaction of the present respondent for the payment of taxes. If such possibilities are made clear in a charging section, the charge operates and takes effect and therefore submits that the levy under the provision of section 6B bearing as it does, all the characteristics of a charging section operates to its full and cannot be curtailed or restricted in its scope or ambit by the mere heading given to section 6B as "levy of resale tax".

34. A proviso to a section being very much part of the section and so also the second and third provisos to section 5(3)(a), it is submitted that there is no liability u/s 5 of the Act in respect of dealers covered by second and third proviso to this section. It is therefore that the turnover of such dealers in respect of which the provisos is attracted are not being taxed u/s 5 and could be the subject-matter of levy of tax u/s 6B of the Act.

35. It is countering such arguments of the learned Government Advocate and strongly supporting the order passed by the learned single judge, the arguments are addressed on behalf of the respondents in the Writ Appeal No. 1260 of 2006 and the writ petitioner in writ petition by its counsel Sri Rabinathan and Thirumalesh.

36. Sri Rabinathan has submitted that on reading the budget speech, particularly paragraph 177, it is clear that it is only a levy on resale. The background in which this section, i.e., resale tax was introduced is also highlighted and explained and as noticed by the Finance Minister in the budget speech. It is contended that sale by one oil company to another oil company is not a resale and at the best it can only be a sale and not a resale.

37. It is also submitted that though under the second proviso to section 5(3)(a) by a fiction, it is deemed to be as not a sale but the product continues to be liable for tax u/s 5(3)(a) but for the second proviso to section 5(3)(a) which is in the nature of exemption provision but nevertheless continues to be liable u/s 5(3)(a) and therefore, section 6B cannot operate on the turnover which is without dispute covered by the second proviso to section 5(3)(a).

38. In support of his submission that heading and marginal notes have a role to play in interpreting the provision, reliance is placed by Sri Rabinathan on the judgment of the Supreme Court in the case of K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, . Reliance is also placed on the judgment in the case of Shree Sajjan Mills Ltd. Vs. Commissioner of Income Tax, M.P., Bhopal and Another, and it is submitted based on this judgment of the Supreme Court that while taxing statute has to be strictly construed but reasonable construction is not excluded and for that purposes that marginal notes and heading will be relevant and assumes importance, etc.

39. It is also submitted that if as mentioned during the budget speech on the Finance Bill and as per the law made under the provisions of section 6B of the Act, resale tax was put into motion by substituting or replacing the earlier turnover tax and the Legislature would not have substituted that provision unless it is a new type of levy different from the earlier turnover tax, as a mere amendment would have sufficed. He has drawn our attention to the definition of the word "substitution" as given in Advanced Law Lexicon edited by justice Y.C. Chandrachud and reads at page 4531 as under:

Substitution. The word "substitution" does not connote two severable steps, one of repeal and another of a fresh enactment, but it means adding by way of amendment to remove an existing anomaly. Bhagat Ram Sharma Vs. Union of India (UOI) and Others, . Punjab State Public Service Commission (Conditions of Services) Regulations, 1958, Regn. 8(c) (as substituted in 1972).

40. Sri Rabinathan has also drawn our attention to the statutory provisions of section 5(3)(a) of the Act in particularly second proviso to section 5(3)(a) of the Act which according to the learned counsel exempts the sale from one oil

company to another oil company and has submitted that though it is so exempted, nevertheless it does not cease to be liable under the provisions of section 5 of the Act but for exemption and therefore, the provisions of section 6B of the Act are not attracted for the reason that when there is liability u/s 5(3) of the Act, that is sufficient to exclude it from scope of levy of tax u/s 6B of the Act. Reliance is placed for this submission about liability to pay tax on the judgment of the Supreme Court in the case of Associated Cement Companies Ltd. Vs. State of Bihar and Others, . Learned counsel has submitted that the judgment of the Supreme Court on interpretation of double taxation avoidance agreement in the case of Union of India and Another Vs. Azadi Bachao Andolan and Another, also supports the case of the respondent/assessee and are squarely applicable to the present situation is his submission. He alternatively submitted that without prejudice to the contentions urged on the question of liability u/s 6B of the Act; that in view of the exemption under the proviso 10 to section 6B of the Act; that proviso itself seeks to exclude the liability under this provision, in any situation mentioned therein and by the same analogy it is contended that liability continues u/s 5 notwithstanding second proviso to section 5(3)(a) of the Act in case of a dealer of oil products. He submitted even the operation of 10th proviso in section 6B of the Act, liability does not arise u/s 6B of the Act in the case of the respondent/assessee.

41. Sri Thirumalesh, learned counsel submits that levy of penalty was also not justified particularly as the assessee was not notified earlier; that though the learned single judge had not gone into this question, the assessee has raised this issue contention and therefore is definitely entitled to urge this issue in appeal by the State. The submission is that the conduct of the assessee was justified in levy of penalty and levy of penalty is also on the higher side; that there is no deliberate or wilful concealment on the part of the assessee and therefore, no penalty is warranted.

42. Sri Rabinathan, learned counsel in fact seeks to rely on the question of fact of budget speech. He submits that budget speech having impact on the language of section and the scheme of the Act being and the other charging section of the Act only on the first sale or first purchase in the State and section 6B of the Act being only a provision under which a subsequent sale is sought to be taxed, the resale heading is appropriate and therefore unless there is resale in the sense that the transaction is in respect of a goods which has already underwent a sale transaction, resale tax is not attracted.

43. Sri Keshavamurthy, learned counsel appearing for the petitioner in STOP No. 112 of 2008 which relates to the assessment years 2002-03 and 2003-04 of the revision petitioner/dealer also raises similar question, viz., as to the liability of a dealer, who is covered by the proviso to section 5(3)(a) of the Act particularly in this case the assessee being covered by the third proviso to section 5(3)(a) of the Act as the revision petitioner is a dealer, who is supplying what is known as butyl rubber tubes to M/s. CEAT who is a trademark brand holder and the sale

being the first sale from the dealer to the brand holder. He therefore submitted that when such a sale is exempted in view of the third proviso to section 5(3)(a) of the Act and the same argument as is advanced in the case of writ petitioner, the provision of levy of resale tax u/s 6B of the Act does not arise but all the authorities, viz., assessing authority, first appellate authority and the second appellate authority of the Tribunal have committed an error on this aspect rejecting this argument in favour of the assessee and therefore, warrants interference by allowing the revision petition.

44. Sri Keshavamurthy, learned counsel for the revision petitioner has placed reliance on the judgment of the Supreme Court in the case of S. Gopal Reddy Vs. State of Andhra Pradesh, contending that in interpreting a statutory provision, adopting a purposive interpretation is beneficial and that would also subserve the object of the Act, he submits that if a purposive interpretation is resorted in the case u/s 6B of the Act also and the intention being to levy tax on resale transaction, a levy of tax in the case of sale transaction to a dealer who supplies the goods to a brand holder, the transaction being exempted in terms of third proviso to section 5(3)(a) of the Act that liability continuing there is no liability u/s 6B of the Act. All other arguments addressed on behalf of the respondent in Writ Appeal No. 1260 of 2006 by Sri Rabinathan are also adopted for the purpose of this assessee.

45. Elaborating his submission, Mr. Keshavamurthy points out that in a sale by a person like the petitioner/dealer to a brand holder by a fiction, it is deemed not a sale and the first sale is treated as a sale by the brand holder and if so, there is no sale in the eye of law and therefore, there cannot be a levy under the provisions of section 6B of the Act as there is no sale transaction at all in the hands of the petitioner to bear or constitute any part of the turnover liable to tax u/s 6B of the Act.

46. Sri Surendran Thumbhoochetty, learned counsel appearing for the appellants in connected appeals, i.e., STA Nos. 11 of 2008 and 12 of 2008 relating to the assessment years 2003-04 and 2004-05 submits that the appellant/assessee is also a dealer who supplies goods to a brand holder, viz., Kirloskar Electric Company Ltd., and the electric motors and generators manufactured by the appellant/assessee is supplied to this brand holder and therefore is covered by the third proviso to section 5(3)(a) of the Act. Apart from adopting the submissions made on behalf of the respondent in writ appeal by Sri Rabinathan also submission made by Sri Keshavamurthy, learned counsel appearing on behalf of revision petitioner in STRP No. 112 of 2008, Sri Surendran Thumbhoochetty supplements the submission by placing reliance on the judgment of the Supreme Court in the case of Dipak Chandra Ruhidas Vs. Chandan Kumar Sarkar, that it was held that an exemption provision to establish to be given for the benefit of the assessee under any enactment which should be given its full play and in this case though the matter arose under the provisions of the Representation of the People Act, 1951 the court was examining the legal

fiction created under the Explanation to section 86(1) of this Act treating that such an order to be an order u/s 98(a) and as a final one for the purpose of that Act by means of legal fiction and it was held by this court that the Explanation under which the fiction was created should be given full play when once it is provided for, etc.

47. The submission is that the legal fiction created u/s 5(3)(a) of the Act should be given its full play and therefore, the transaction being not one in the nature of a sale transaction at all in the case of a sale by one oil company to another oil company in the case of either by one oil company or another oil company or by a dealer, who is supplying goods to the brand holder as levy of tax u/s 6B of the Act being a tax on resale and there being no transaction of sale at all either earlier as the transaction of supply of goods to brand holder is not sale in the eye of law to the proviso, the liability u/s 6B does not arise.

48. Sri Keshavamurthy, learned counsel appearing for the petitioner in the sales tax revision petition and Sri Surendran Thumbhoocherty, learned counsel appearing for the appellants in STA Nos. 11 of 2008 and 12 of 2008 submitted that a decision in the writ appeal in one way or the other relating to the liability of such dealers, who are covered by the second or third proviso to section 5(3) (a) of the Act in respect of liability to resale tax u/s 6B of the Act equally governs the case of the revision petitioner and the appellant respectively and the argument is so far as liability of section 6B of the Act is concerned, it is one and the same, i.e., there is no tax liability u/s 6B of the Act.

49. Section 6B of the Act is no doubt introduced by way of amendment to the Act and by the substitution of the earlier section 6B, which had in the name of turnover tax as per the State Act No. 5/2002 with effect from April 1, 2002.

50. This levy is a transitional levy, in the sense, it lasted only for three years, as it came to an end with the inception of the Karnataka Value Added Tax Act with effect from April 1, 2005. Budget speech of the Finance Minister on this aspect, reads as under:

177. VAT entails multi-point levy of tax at all points of production and distribution. The second and subsequent dealers in the trade channel who are currently paying a nominal non-passable turnover tax of one per cent would have to pay tax under VAT which could be higher but collectable. As an intermediate measure and to prepare dealers for a smooth transit to VAT, I propose to introduce a collectable resale tax of 1.5 per cent. Most of the commodities, which are totally exempt from tax on their second and subsequent sales, however, are proposed to be exempt from this new levy. This collectable new levy should induce the entire trade to issue bills on all their sales.

51. The Budget speech of the Finance Minister no doubt says that it is for preparing the assessee for a switch over from the scheme of single point levy under the assessee's dealers who are accustomed to single point levy under the Karnataka Sales Tax Act to the scheme of levy on every sale transaction but only

in respect of value added tax, etc.

52. While that may be introductory to the introduction of the Karnataka Value Added Tax Act, 2003 and the Finance Minister had an occasion to mention that in the background of introduction of resale tax u/s 6B of the Act, a perusal of the relevant paragraph in the budget speech, namely, paragraph 177, as noticed above, the preparation as noticed is for introduction of equitable resale tax at 1.5 per cent and at the same time, care is being taken to ensure exemption enjoyed in respect of commodities which are so exempted earlier and their transaction and subsequent sales and also for inducing the entire trade to issue bills on all sales. Except for using word "resale tax", it does not necessarily say that it is tax only on the second or third transaction, but what is assured is that second or third transaction which had enjoyed the benefit of exemption earlier will not be deprived of the same, etc.

53. Paragraphs 170 and 171 which are introduction to the proposed amendments on the Sales Tax Act, only speaks of rationalization measures and what proposals are made for change, etc. If a parallel is to be drawn between the Karnataka Value Added Tax Act, 2003 and the levy u/s 6B of the Act, then in fact an indication that value added tax being a multipoint levy of tax at all points of production and distribution and introduction of resale tax u/s 6B of the Act being to prepare trade for such purpose, the budget speech does not necessarily give an indication that there will not be any levy of resale tax at the first transaction though it is called as resale tax.

54. Now, coming to the significance of the budget speech and the heading under marginal notes, etc., it is no doubt and as held by the Supreme Court in the two cases relied upon by learned counsel for the assessee-dealer, they are aides in construction. The question will arise only when there is a scope for construction and need for construction, etc.

55. Relevant portion of section 6B of the Act reads as under:

6B. Levy of resale tax.--(1) Every registered dealer and every dealer who is liable to get himself registered under sub-sections (1) and (2) of section 10 whose total turnover in a year is not less than the turnovers specified in the said sub-sections, shall be liable to pay tax at the rate of one and half per cent of such portion of the total turnover which is not liable to tax under sections 5, 5A, 5B, 5C or 6:

...

Provided that no tax under this sub-section shall be payable on that part of such turnover which relates to,--

(i) to (ix) . . .

(x) the total amount paid or payable by the dealer as a consideration for the purchase of any of the goods in respect of which tax is leviable at the point of

sale;

...

56. Section 6B of the Act is quite clear and unambiguous and liability u/s 6B though called as resale tax is to pay tax at the rate of 1.5 per cent on such portion of the turnover, which is not liable to tax under any of the provisions of sections 5, 5A, 5B or 6 of the Act. Therefore, the only condition is that, that part of the turnover which is liable to tax or taxed under any of the provisions of sections 5, 5A, 5B or 6 of the Act is not to be included in the turnover liable to tax u/s 6B of the Act and is further regulated by the proviso. The language of the section does not necessarily indicate that the liability of resale tax is only on second or subsequent sale and not on the first transaction.

57. On a reading of section 6B of the Act, it is obvious that the liability under this section is on all registered dealers and those who are liable to get registered in respect of their total turnover but excluding such part of the turnover in respect of which the dealer is liable to pay tax under sections 5A, 5B, 5C or 6 of the Act. That means the turnover which is liable for tax in these sections is kept out of the purview of the resale tax u/s 6B of the Act. The argument on behalf of the assessee-dealers is that though they enjoy exemption either under the second proviso to section 5(3)(a) of the Act, as in the case of the writ petitioner, or under the third proviso of section 5(3)(a) of the Act, as in the case of the revision petitioner and the appellant in revision petition and sales tax appeal respectively, such turnover, i.e., part of the turnover of sales or transfer from one oil company to another oil company and turnover relating to sale of goods by manufacture and supply of goods to a brand owner to market under its brand name continues to be liable though they may get such exemption u/s 5 of the Act.

58. This argument is fallacious for the reason that under the proviso to section 5(3)(a) of the Act, tax liability is exonerated on such dealers and they neither pay tax nor are they liable in respect of such part of the turnover u/s 5 of the Act. The other sub-sections and levy of tax under sections 5A, 5B, 5C or 6 of the Act being in the alternative, they are not liable under any of these other provisions also and therefore even in respect of such turnover which is a transfer from one oil company to another, supply of goods by manufacturer to a brand holder, it is nevertheless, forming part of the turnover for the purpose of section 6B of the Act is not acceptable. A reading of relevant portion of section 5(3)(a) with its proviso as under:

5. Levy of tax on sale or purchase of goods.--

(3) Notwithstanding anything contained in sub-section (1), the tax under this Act shall be levied--

(a) in the case of the sale of any of the goods mentioned in column (2) of the Second Schedule, by the first or the earliest of successive dealers in the State

who is liable to tax under this section, a tax at the rate specified in the corresponding entry of column (3) of the said Schedule, on the taxable turnover of sales of such dealer in each year relating to such goods:

...

Provided also that in respect of sale of goods mentioned in (Serial Number 11A of Part F, Serial Number 12 of Part M and (Serial Number 5 of Part P and Serial Number 1 of Part K) of the Second Schedule, the sale by one oil company to another oil company shall not be deemed to be a sale by the first or the earliest of successive dealers in the State but the sale by the latter company to another person not being an oil company shall be deemed to be the sale by the first or the earliest of successive dealers in the State liable to tax:

Provided further that where any goods liable to tax under this Act are produced or manufactured by a dealer with the (brand name or trade mark), of any other dealer and which are not used by the latter as raw materials, component parts or packing materials as defined under the Explanation to section 5A, the sale of such goods by the dealer who has produced or manufactured to the dealer who is the brand name or trade mark holder, shall not be deemed to be, but the subsequent sale of such goods by the dealer having the right either as proprietor or otherwise to use the said name or the trade mark, either directly or through another, on his own account or on account of others shall be deemed to be the sale by the first dealer liable to tax under this section.

...

makes this position very clear.

59. The further question is only as to whether the instant dealers in the case of writ petition being a dealer who is known as Oil Corporation in Explanation (2) to section 5(3)(a) of the Act and in the revision petition and the appeal, the dealers being assesseees who are covered by the third proviso, are liable to tax or not is an independent question which can be examined. But, if there is no liability under any of these statutory provisions, there is no gainsaying that liability u/s 6B of the Act is attracted.

60. Insofar as the heading and marginal notes are concerned and decisions relied upon by the assessee-dealers in our considered opinion, cannot have a bearing in the present case, for the simple reason that on perusal of the charging section, section 6B of the Act which is an independent charging section, it is quite clear as to the nature of levy and the situation when the levy is attracted. In fact, reliance placed by the learned Government Advocate on the judgment of the Supreme Court in the case of Municipal Council, Kota, Rajasthan Vs. The Delhi Cloth and General Mills Co. Ltd., Etc. Etc., wherein the Supreme Court had an occasion to consider the nature of levy under that Act which was captioned "dharmada" and placing reliance on the decision of the Privy Council in the case of AIR 1930 129 (Privy Council) , holding that the caption though was "water

tax" is not tax on water nor was on its production and applying this ratio, holding that the real character or nature of levy alone is determinative and not nomenclature, motive or wrong reasons, etc., and had concluded that "dharmada" levy raised for specific purposes, it was, nevertheless, in the nature of an octroi and did not amount to double taxation and therefore was a levy in the competence of State Legislature.

61. Significance for our purpose is that in a taxing statute, the nomenclature or heading given is not conclusive, but to know as to what is substance of the matter, one has to go by the language of the charging section.

62. Smt. S. Sujatha, learned Additional Government Advocate, on the other hand, has placed reliance on the decisions of this court in the case of *Amberkar Pre Stressed Products and Others Vs. Additional Commissioner of Commercial Taxes*, and submitted that irrespective of the budget speech, what matters ultimately is what part of the speech is translated into statutory provision and submission that budget speech though it was called "resale tax", and ultimately section 6B was legislated with the caption "levy of resale tax", etc., and that in itself is not conclusive to hold that there should be a resale commends our acceptance.

63. Section does not make it explicit as to what exactly is resale or what is the levy of resale tax to take it out of the purview of the first sale transaction.

64. We are of the considered opinion that heading or the marginal note can only have a limited application and was determinative factor so long as charging section is clear and unambiguous and spells out the nature of liability, event, person, place or levy point person on whom levy is hoisted and the rate at which the levy is to be provided and therefore mere heading "levy for resale tax" cannot be conclusive.

65. We notice that the learned single judge has placed strong reliance on the Division Bench decision of this court in the case of *Madhur Trading Co. and others Vs. State of Karnataka and others*, .

66. The learned Additional Government Advocate has distinguished this case by pointing out that in this decision, the liability u/s 6 of the Act what is known as "purchase tax" was not attracted in the case of sale of goods which are covered by the proviso to section 5(3)(c) of the Act. It is pointed out that u/s 5(3)(c) of the Act, levy of tax in respect of silk fabrics at the rate of four per cent at the point of last sale in the State by a dealer is liable to tax under the Act and on his taxable turnover relating to such goods in each year was subjected to a proviso and under the proviso, a sale by a handloom or powerloom weaver, factory of silk fabrics manufactured by him in Karnataka is not by a fiction deemed to be a sale for the purpose of this Act.

67. The distinction is pointed out from the instant case, i.e., the second and third proviso to section 5(3)(a) of the Act and then proviso to section 5(3)(c) of the

Act. It is submitted by learned Additional Government Advocate that second and third proviso to section 5(3)(a) of the Act operates only for the purpose of this section, whereas in proviso to section 5(3)(c) of the Act, fiction operated for the entire purpose of the Act and therefore obviously its operation is extended even to section 6 of the Act.

68. The submission is that a fiction created for the purpose of section 5(3)(a) of the Act cannot be accepted and applied for the charge created u/s 6B of the Act.

69. This argument is an acceptable argument as we find that section 6B of the Act is governed by the provisos appended to this section and the proviso to section 5(3)(a) of the Act are only for the purpose of liability u/s 5 of the Act and not for all other purposes.

70. The learned single judge in allowing the writ petition has proceeded on the premise that the position of law and the facts are as in the case of Madhur Trading Co. and others Vs. State of Karnataka and others, , holding that in view of the fiction deeming transaction to be not a sale under second and third proviso in respect of situations covered by it, the turnover even for the purpose of section 6B of the Act is not a sale and therefore no tax is leviable, etc.

71. In our considered opinion, the learned single judge was in error in following the judgment of the Division Bench of this court in the case of Madhur Trading Co. and others Vs. State of Karnataka and others, . In fact, the distinction made in respect of the very decision by subsequent single Bench decision of this court in the case of Universal Transformers Vs. Assistant Commissioner of Commercial Taxes and Others, where distinction was made for the purpose of section 6B of the Act, turnover tax as it existed then and for the levy getting attracted on the turnover tax though there was no tax u/s 5 of the Act as fiction did not exist to turnover tax as it existed then.

72. In this case, the interpretation and the applicability of the third proviso to section 5(3)(a) of the Act came in for consideration in the context of the liability under the then section 6B of the Act (turnover tax) and it was clearly held that section 6B turnover tax being an independent charging section and containing a rate and taxing event and therefore it is only exemption or benefit that are given u/s 6B of the Act alone that can matter and not exemption u/s 5(3)(a) of the Act that matters. In the present case, the principle is the same and in fact in respect of the assessee in the sales tax appeal and the revision petition, it is an identical situation though in respect of the writ petitioner-assessee it is only the second proviso which is attracted, but effect is the same.

73. In fact, learned Additional Government Advocate has placed reliance on the decision of the Division Bench of this court in the case of Food Corporation of India [2004] 138 STC 235 (Karn) : [2004] 138 STC 235 (Karn) to submit that distinction made by the learned single judge in the case of Universal Transformers Vs. Assistant Commissioner of Commercial Taxes and Others, and situation applied in the case of Madhur Trading Co. and others Vs. State of

Karnataka and others, is noticed in this judgment by the Division Bench and distinction was for the purpose of section 5(3)(c) of the Act and proviso to section 5(4) of the Act; that the question was also one in the circumstances as to whether fiction u/s 5(4) is extended to levy of purchase tax u/s 6 also and it was held that it cannot be extended.

74. In this view of the matter, we are of the opinion that the budget speech in itself cannot make any difference and fiction created for the purpose of section 5(3)(a) of the Act cannot be sought to be projected or telescoped into the provisions of section 6B of the Act.

75. However, learned counsel for the assessee-dealers have raised a strong contention to submit that the liability on the part of the dealers covered by the second and third proviso to section 5(3)(a) of the Act is exempted because of the operation of the provisos to section 5(3)(a) of the Act, but nevertheless tax continued to be leviable u/s 5(3)(a) of the Act but for the exemption. The submission is that exemption provision does not extinguish the liability and it is only because of the liability exemption is necessary. In support of this proposition, strong reliance is placed on the judgment of the Supreme Court in the case of Associated Cement Companies Ltd. Vs. State of Bihar and Others, .

76. This is a case which arose under the provisions of the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale therein Act and by exemptions provided for in terms of the provisions of Industrial Policy of the Bihar State, providing for exemption of tax in certain situations. The exemption was in respect of such of those new units or existing units which have come up with additional production capacity with regard to sales tax and equally applicable to other taxes like entry tax, etc. There was also deduction allowed from out of sales tax liability from out of the tax paid under the said Act, etc.

77. In this case, disallowance of deduction from the sales tax liability by the authorities and as had been approved by the High Court was reversed by the Supreme Court holding that exemption given in respect of that part of the turnover which qualified for the benefit under the Industrial Policy, does not make that turnover cease to be liable to tax, but the liability continued and it is only because of the exemption, the benefit was given to the assessee not to tax or not to levy tax and further the benefit of deduction from the sales tax turnover of the tax paid under the Entry of Goods Act cannot be denied to the assessee.

78. In this case, the exemption had been notified by a separate provision of the Act which enabled such exemption. In the instant case, what we notice is that second and third proviso are not provisions which provides for exemption, but for which assessee would have continued to be liable u/s 5(3)(a) of the Act. Submission of learned Government Advocate is that this is not the case of exemption, but this is a case of creation of no liability or extinguishing liability by a fiction of law. A perusal of the provisions of section 5(3)(a) and second and

third provisos indicates that the liability u/s 5 of the Act is taken away by creation of a fiction, namely, that it is deemed not the first sale.

79. The so-called exemption though cannot be termed as precise exemption is because of the language of the second and third provisos and which is very much part of section 5(3)(a) of the Act. That means, because of the second and third provisos, there is no liability u/s 5(3)(a) of the Act which is the charging section, and in the hands of the assesseees who are dealers of the type referred to in the second and third provisos. It is not a mere exemption but it is a charge being created or not created, extinguished under the charging section 5(3)(a) of the Act. The provisos are very much part of section 5(3)(a) of the Act and therefore we are of the view that there is no liability created u/s 5(3)(a) of the Act for payment of sales tax in the hands of the type of dealers who are covered by second and third provisos. It is not merely a case of non-payment of tax because of an exemption, but it is a case of non-liability to tax under the very charging section. If a charge is created u/s 5(3)(a) of the Act in respect of type of dealers who are referred to in second and third provisos at all, then perhaps exemption is to be looked at elsewhere. But, the language of section itself makes it clear that by a fiction, it is deemed not sale in the hands of the first dealer and therefore there is no charge. This case is distinguishable from the case decided by the Supreme Court in the case of Associated Cement Companies Ltd. Vs. State of Bihar and Others, where it was a case of exemption notification independently.

80. It is in this background that we have to hold that the liability under provisions of section 6B of the Act from the scope of which is excluded that part of the turnover which is liable to tax under sections 5, 5A, 5B, 5C and 6 of the Act and in the instant case we are concerned only with the dealers who are governed by the second and third provisos to section 5(3)(a) of the Act and in their hands there is no liability u/s 5(3)(a) of the Act and therefore such part of the turnover which is not having liability u/s 5(3)(a) of the Act in the hands of the dealers concerned, nevertheless, can, definitely, form subject-matter of levy of the tax u/s 6B of the Act.

81. One another argument on behalf of the assessee-dealer is that on the same analogy and in view of the tenth proviso to section 6B of the Act also, the assessee is not liable to tax u/s 6B of the Act, submission is that because of the fiction when it is deemed not a sale at all, the question of levy u/s 6B of the Act cannot arise as levy is on the turnover mentioned in this section comprising of sale transactions and other transactions. If it is not sale at all u/s 5(3)(a) of the Act, then it is no sale for the purpose of tenth proviso to section 6B of the Act and as such disputed that the turnover cannot be included for tax u/s 6B of the Act. Here also we find that the argument principally proceeds on the premise that fiction as found in the provisos to section 5(3)(a) of the Act operate for the purposes of section 6B the Act also.

82. We have already noticed that the ratio of the decision of this court in the

case of Madhur Trading Co. and others Vs. State of Karnataka and others, is not applicable to the present case and distinction noticed earlier in the case of Universal Transformers Vs. Assistant Commissioner of Commercial Taxes and Others, is equally applicable to the present case also to conclude that a fiction created for the purpose of section 5(3)(a), levy on a dealer cannot be telescoped for the purpose of section 6B of the Act also, and therefore we reject this submission.

83. If the fiction created under the proviso to section 5(3)(a) of the Act cannot be extended, then we notice that for the applicability of tenth proviso to section 6B of the Act and on the language of the tenth proviso, no case is made out for the assessee-dealer either about the amount paid or payable by the dealer as consideration for purchase of any of the goods in respect of which tax is leviable at the point of sale, in particular, in fact at the point of sale there is no liability and therefore payment of any tax at the point of sale in the hands of such dealers covered by second and third provisos to section 5(3)(a) of the Act does not arise. Therefore, tenth proviso to section 6B of the Act has no application to the assessees.

84. In the case of the respondent in writ appeal and writ petitioner-dealer as part of the assessment order and on noticing that the assessee had not paid tax liability earlier and the exercise was as a sequel to inspection, the assessing officer had levied penalty under the provisions of section 12A(1A) of the Act.

85. It is submitted by learned counsel for the writ petitioner-dealer that though the liability was determined as a sequel to certain inspection and assessment was reopened and assessee had in fact filed return earlier and had disclosed this turnover, but had claimed exemption and this was not in any way disputed by the Department; that the turnover had been subject-matter of examination though not for the purpose of levy, u/s 6B of the Act, but for other purposes under the very enactment and therefore it is submitted that there is no wilful default or suppression within the meaning of the provisions of section 12A(1A) of the Act.

86. On the other hand, learned Additional Government Advocate has pointed out to the preamble to the levy of penalty in the order of the assessing authority and it is noticed that the assessee had not declared the turnover for the purpose of levy u/s 6B of the Act and in fact no monthly statements showed the subject turnover and claimed any exemption; that it was not disclosed at all; that the assessing authority had also recorded a finding that books of accounts of the assessee for the assessment year 2002-03 which was produced for examination also did not disclose transaction of sale of goods taxable u/s 5 of the Act. The correctness of the statement is disputed.

87. It is not necessary for this court to go into the disputed facts and to sit in appeal over these orders as a court of appeal, while exercising writ jurisdiction. The question in this appeal is as to whether the order passed by the learned single judge holding that the assessee has no liability u/s 6B of the Act is

sustainable or not. We have given a categorical finding that the assessee is liable u/s 6B of the Act, though the nomenclature is "levy of resale tax", which by itself cannot convey a precise meaning as is sought to be contended on behalf of the assessee and there being justification mentioned in the assessment order for levy of penalty u/s 12A(1A) of the Act and having recorded a finding that it was a clear case of willful non-disclosure on the part of the assessee and having levied penalty, we think in this writ appeal, we cannot examine such contentions as though court of appeal on the order of the assessment passed and levy of penalty is part of the same. In fact, the learned single judge had not gone into this question and therefore we think there is no need for us either to go into the merits of the submissions made by learned counsel for the assessee any further.

88. Though a request is made by the assessee to file an appeal, we think that it is not possible for us to permit the assessee to take this course of action as assessee took its chances by approaching this court invoking writ jurisdiction which the assessee is aware is not appellate jurisdiction. Therefore, we do not go into this question any further, but the consequences follow on setting aside of the order of the learned single judge and holding that the assessee is liable to pay tax u/s 6B of the Act in respect of the disputed turnover.

89. In this view of the matter, we conclude holding that the learned single judge is in error in allowing the writ petition and that reliance placed on *Madhur Trading Co. and others Vs. State of Karnataka and others*, is not proper and following the decision and ratio allowing the writ petition is also not proper and argument of learned counsel on behalf of the assessee to the effect that budget speech concludes that it is only a levy on second or third sale transaction is not tenable, whereas it is not so and is negated by examining the contents of the charging section 6B of the Act and it is also held that the assessee is not liable to tax u/s 5 of the Act as no liability was created in terms of the proviso to section 5(3)(a) of the Act, liability that matters for the purpose of section 6B of the Act being such part of the turnover in respect of which there is no liability under sections 5, 5A, 5B, 5C and 6 of the Act and there being no liability as noticed above, provisions of section 6B of the Act in respect of disputed turnover is very much attracted. The disputed turnover being not taxed either u/s 5 or under sections 5A, 5B, 5C or 6 of the Act, can constitute very much part of the taxable turnover u/s 6B of the Act and therefore liability arises.

90. The argument of the assessee that tenth proviso operates on them is also rejected by holding that the tenth proviso has no application to the writ petitioner-dealer or the dealers in the revision petition and the sales tax appeal.

91. In the result, Writ Appeal No. 1260 of 2006 is allowed. The impugned order passed by the learned single judge is set aside and the writ petition is dismissed. Parties are left to bear their own costs.

92. Substantial question of law for the examination of which STRP No. 112 of 2008 has been admitted is answered in the affirmative, against the assessee and

in favour of the Revenue to sustain the impugned order of the Tribunal. As a consequence, STRP No. 112 of 2008 and STA Nos. 11 of 2008 and 12 of 2008 are all dismissed.